amount which the debtor would otherwise have had the right to demand and expect from him.[50]

For the Virginia law on this subject see VIRGINIA SECTION, p. 236.

B. P. C.

IS SECTION 50(K) OF THE PRESENT BANKRUPTCY ACT DIRECTORY OR MANDATORY?—The present Bankruptcy Act of 1898, as amended, requires of a trustee in bankruptcy no more definite qualification than that he be competent, and that he reside or have an office in the judicial district within which he is appointed.[1] He must be competent; and if, in the opinion of the creditors and in that of the court, as shown by its approval of the creditors' choice, he measures up to their standard of competency, and at the same time has an office or is a resident in that district, he satisfies the statute. Being thus qualified, the statute[2] further requires that he enter into bond, approved by the court, "before entering upon the performance of * * * official duties, and within ten days after * * * appointment, or within such further time, not exceeding five days, as the court may permit, * * *."

Thus the failure to qualify further before entering upon the performance of the trustee's duties results in a vacancy in his office. To quote the statute verbatim:[3]

> "If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office."

This section gives rise to the question whether a failure on the part of the trustee in bankruptcy to enter into bond vacates the office, *ipso facto,* or whether such failure to comply with the statute and a continuance in office creates a *de facto* trustee; in other words—whether the section is directory or mandatory. It is stated by Remington[4] that failure thus to qualify is a fatal defect in the trustee's title to office, rendering the office vacant *ipso facto.* But Remington cites no authority, and gives neither reason nor principle upon which he bases this bare assertion. If this failure does in fact operate *ipso facto* to vacate the office, and is mandatory, a *de facto* trustee cannot possibly be created, for the office becomes vacant *ab origine;* no officer exists, not even under a colorable title.

In a recent case, however, *Sharfsin* v. *United States,* 46 Am.

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[50] Rippon *v.* Norton, 2 Beav. 63; Page *v.* Way, 3 Beav. 20; Wallace *v.* Anderson, 16 Beav. 533; Kearsley *v.* Woodcock, 3 Hare 185; Hutchinson *v.* Maxwell, 100 Va. 169, 40 S. E. 655, 7 VA. LAW REG. 785, and note; Carter *v.* Brownell, *supra.*

[1] Bankr. Act, § 45.

[2] Bankr. Act, § 50 (b).

[3] Bankr. Act, § 50 (k).

[4] 1 REMINGTON, BANKRUPTCY, § 877.

B. R. 1, it was held that "although the trustee did not give bond, and although the statute provides that the office shall be vacant upon his failure to do so within 10 days, he nevertheless remained the *de facto* trustee, charged with all the official duties of the position, and entitled to enforce all the rights of a trustee against the defendant." According to the opinion of the court the office is not *ipso facto* vacated, but "these rights and duties could only be ended by judicial declaration of a vacancy." In this case the trustee was appointed June 10, 1918, and did not qualify by bond until June 10, 1919.

The rule is generally established that statutes creating an office which is of a public character, declaring such office to be vacant upon the failure of the appointee to give bond,[5] take the oath of office,[6] or upon his acceptance of another office of profit or trust,[7] are directory only.[8] Such statutes, it is said, do not execute themselves,[9] but vest the appointing or electing power with the right to fill the vacancy without the necessity of first resorting to judicial proceedings. The incumbent, because the office is merely deemed to be vacant and not actually vacant, is a *de facto* officer.

> "Mere words in a statute cannot alone make an office unoccupied which in fact is occupied. The legal meaning of the words, in such circumstances, is that the office has no occupant who holds by a good title in law, and that the appointing power may at once be exercised to fill it, or if it is an elective office, the people may elect, and no adjudication is required to declare the vacancy * * *." [10]

The entire doctrine of *de facto* officers rests on the principle of public policy. The nature of a public officer, and of an officer who comes in constant touch with the community, makes it necessary for the law to cast about the interests of the public and the individual the protective doctrine of *de facto* officers. In the words of Chief Justice Butler: [11]

> "The *de facto* doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in

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[5] Clark *v.* Ennis, 45 N. J. 69; *Contra* see State *v.* Lansing, 46 Neb. 514, 64 N. W. 1104.

[6] People *v.* Payment, 109 Mich. 553, 67 N. W. 689.

[7] State *v.* Coleman, 54 S. C. 282, 32 S. E. 406; Oliver *v.* Jersey City, 63 N. J. 134, 44 Atl. 709, 48 L. R. A. 412.

[8] "Statutes requiring an oath of office and bond are usually directory in their nature; and unless the failure to take the oath or give the bond by the time prescribed is expressly declared, *ipso facto*, to vacate the office, the oath may be taken or the bond given afterwards, if no vacancy has been declared." 1 DILLON, MUNICIPAL CORPORATIONS, 5th ed., § 394.

[9] "It is clear, I think, both upon reason and authority, that a statute declaring an office vacant for some act or omission of the incumbent, after he enters upon his duties, does not execute itself." Van Syckel, J., in Clark *v.* Ennis, *supra*, at p. 72.

[10] Oliver *v.* Jersey City, *supra*.

[11] State *v.* Carroll, 38 Conn. 449, 467, 9 Am. Rep. 409, 423. See also Petersilea *v.* Stone, 119 Mass. 465, 20 Am. Rep. 335.

> the official acts of persons exercising the duties of an office, without being lawful officers. It was seen, as was said in *Knowles* v. *Luce*, that the public could not reasonably be compelled to inquire into the title of an officer, nor be compelled to show a title, and these became settled principles in the law."

This doctrine with its protection has its limitations. The *raison d'être* thereof, that is, the protection of a public unaware of the defects in an officer's title, may be removed when such defects are known to the public. In such cases the doctrine is not applicable. "This legal protection is not afforded where the defects in the title of an officer are notorious, and such as to make those relying on his acts chargeable with such knowledge." [12]

Not only is the doctrine of *de facto* officers not absolute, but the interpretation of those statutes creating a vacancy in an office as directory and as setting up *de facto* officers, is equally not absolute. The interpretation of such statutes, as the interpretation of all statutes, must be made to conform with the intent of the legislative bodies enacting them. To do otherwise is to do violence both to the spirit of the statute and to the intent of the legislature. The intent of the law-making body must be the guiding force in the interpretation of statutes.

The reason for the *de facto* doctrine—the regard for the public weal—seems to indicate that the doctrine is to be limited to those officers that are public in nature, those with whom the public must constantly deal. It is not to be extended to officers that are not of that character, and statutes creating a vacancy in such offices upon the failure of the appointee to conform to its requirements, must be regarded as mandatory.[13] Thus it was held [14] that the doctrine of *de facto* officers does not apply to a merchant appraiser who is appointed by the collector of a port, for the reason that he was not a public officer. The court said:

> "We think, however, that the decisions in relation to the acts of officers *de facto*, are reasonably to be restricted to those who hold office under some degree of notoriety, or are in the exercise of continuous official acts, or are in possession of a place which has the character of a public office. * * * Merchants called in by the collector to estimate the value of merchandise, take no rank as public officers. * * * They rather hold the position of referees, or trustees,

[12] Oliver *v.* Jersey City, *supra*. The same principle is expressed in State *v.* Carroll, *supra*.

[13] Thus under a statute providing that if the official bond of one appointed to office is not given and oath taken within 30 days after he receive notice of his appointment, the office shall be considered vacant, a special railroad policeman who failed to so qualify within the prescribed period was held not to be a *de facto* officer. Cincinnati, etc., R. Co. *v.* Cundiff, 166 Ky. 594, 179 S. W. 615.

[14] Vaccari *v.* Maxwell, 28 Fed. Cas. 862.

charged with the performance of a single act, or appointed to act in an individual case. We think that the statute in question is mandatory, and that the acts of a merchant appraiser, done without the sanction of an oath, are both irregular and void."

It may then be said that, if the office is one of a public character, a statute declaring the office vacant upon the failure to carry out its provisions, is directory, unless a contrary legislative intent is expressed. If, on the other hand, the office is not of that public nature, or if the office is for the performance of a single act, or in an isolated case, such statute is to be regarded as mandatory—self-executory—as expressing the intent of the lawmakers in the absence of an expressed intent to the contrary.

From what has been said, it may be inquired whether § 50 (k) of the Bankruptcy Act is mandatory or directory. This may be gathered from the nature of the office of a trustee in bankruptcy and from the apparent intent of Congress expressed in the provisions of the Act.

The trustee in bankruptcy occupies a dual position.[15] He is an officer of the court,[15] and in that capacity he is rather the official custodian of the property of the bankrupt's estate, and holds for all concerned; and he is a party litigant, a party in interest as representative of the general creditors.[16] But he is an officer of the court in a restricted sense.[15] "While the bankruptcy act creates the office of trustee in bankruptcy, such trustee is a *quasi* officer of the court in a qualified sense. He is in reality elected by and represents the creditors of the bankrupt, under the provisions of the bankruptcy act."[17] His relation to the general creditors is one of trust and confidence,—it is a fiduciary relation.[18] The duties of the trustee as officer of the court are rather negligible as compared to his duties as the trustee of the general creditors. He is their representative. The creditors elect him; they pass upon his qualifications in the first instance; they fix the amount of his bond; and upon their complaint he is removed from office by the court.[19] Without going into details, the true position of the trustee and his relation to the general creditors is quite evident.

Does the fact that he is a "*quasi* officer of the court in a qualified sense" make him a public officer? The query can best be answered by a quotation from the opinion of Justice Allen in a New York case:[20]

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[15] COLLIER, BANKRUPTCY, 11th ed., p. 720.
[16] BLACK, BANKRUPTCY, § 298; COLLIER, BANKRUPTCY, 11th ed., p. 720.
[17] McLean *v.* Mayo, 113 Fed. 106, 7 Am. B. R. 116.
[18] 1 REMINGTON, BANKRUPTCY, § 897.
[19] Bankr. Act § 2 (17). "The creditors have, however, no control over the removal of trustees, other than to initiate proceedings to that end. The former law gave them such control 'with consent of the court'." COLLIER, BANKRUPTCY, 11th ed., p. 710.
[20] Matter of Hathaway, 71 N. Y. 238, 243.

"The term 'office' has a very general signification, and is defined to be that function by virtue whereof a person has some employment in the affairs of another; and it may be public, or private; or *quasi* public, as exercised under public authority, but yet affecting only the affairs of particular individuals. * * *. While the duties of the class of officers last named, referees, etc., were of a public nature, and in a sense concerned the public and the administration of justice, and were exercised under authority derived from the State directly, and not from individuals, still they related especially to particular individuals and a specific litigation; and their authority is restricted to specific matters, and no general powers are conferred upon them authorizing to act in respect to all like cases, or in any case or matter other than specified and named in their appointment. They owed no duty to the public, and could perform no service for the public. The trust they exercise and the duties they perform are 'transient and occasional'."

It would seem, then, that a trustee in bankruptcy should be excluded from the category of "public officers". Although acting under authority of a public statute, he is nevertheless appointed by particular individuals to administer the property of a designated person, in a specific case; owing no duty to the public in that capacity, he acts, all in all, in an individual capacity, save, perhaps, when he, as an officer of the court, is selling the assets of the estate to convert it into money. His office, as a whole, is not of that degree of notoriety that would make it of a public nature. His official capacity as a court officer is qualifiedly *quasi* and negligible; moreover, he acts in an isolated case. Applying the doctrine stated in *Vaccari* v. *Maxwell*,[21] the principle of *de facto* officers cannot be applied to trustees in bankruptcy. Speaking of merchant appraisers who have not taken the oath prescribed by statute, the court in this case said: "They rather hold the position of referees, or trustees, charged with the performance of a single act or appointed to act in an individual case. We think that the statute in question is mandatory." Under the term trustee must be included trustees in bankruptcy.[22]

The intent of Congress can be gathered from the wording of § 50 (k). On the failure to give bond, the trustee "shall be deemed to have declined his appointment". It is absurd to say that when a person is deemed to have declined an office he has accepted the appointment and occupies the office. § 50 (k) continues in definite terms, "and such failure shall create a vacancy in his office". The intent of Congress is clearly manifested here. The failure to give bond produces one consequence—"a vacancy shall be created"; not shall be deemed to have been

[21] *Supra.*

[22] Winslow, J., in McKeigue *v.* Chicago, etc., R. Co., 130 Wis. 543, 110 N. W. 384, 11 L. R. A. (N. S.) 148.

created but actually created and vacant—*ipso facto*—because the appointee is deemed to have declined the proffered appointment *ab origine,* unless, of course, the time is extended by the court as the act allows. The bond, furthermore, is of vast importance in the case of the trustee in bankruptcy because of the delicate position in which he is placed and the peculiar nature of his duties. Creditors fix the amount of his bond so that they may be assured of the faithful performance of his duties, and may also be insured against the misappropriation of the funds in the hands of the trustee—against all possible conversion or other improper acts. Congress, realizing the situation, provided that the trustee file his bond before he enter upon the performance of his duties. It is expressly provided in § 50 (b), requiring a bond, that "trustees, *before* entering upon the performance of their official duties, *and* within ten days after their appointment, etc.," shall qualify by filing their bond. Reading §§ 50 (k) and 50 (b) together the intent of Congress appears to be obvious and not open to dispute.

Remington says:[23] "If he has not qualified by the end of that time, (10 day period plus the five days grace) the delay is fatal; the office becomes *ipso facto* vacant and a new election must be held." On the same subject Collier says:[24] "This seems mandatory, but the practice of extending the time still further when no objection is made is quite general."

The authorities cited by the court in *Sharfsin* v. *United States, supra,* in support of its decision do not warrant the terse treatment given the question. The court was called upon to decide a new question of law under the present Bankruptcy Act, and although the decision was to be based upon familiar principles, yet the application of these principles should be governed by the circumstances arising under the Bankruptcy Act, the wording of the Act, and the general nature of a trustee in bankruptcy.

The court cites the following authorities:

Ex parte Ward.[25] But this case merely reiterates the general doctrine of *de facto* officers.

Wade v. *United States.*[26] This case held that one appointed and acting as *posse comitatus* and guard was a *de facto* officer, even though the clerk who administered the oath was not empowered to do so.

The case next cited by the court—the leading case of *Norton* v. *Shelby County*[27]—held that "* * * for the existence of a *de facto* officer, there must be an office *de jure* * * *;" that a *de facto* office was not created under an unconstitutional law, because such law is no law, and no office can exist under it.

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[23] REMINGTON, BANKRUPTCY, § 877.
[24] COLLIER, BANKRUPTCY, 11th ed., p. 752.
[25] 173 U. S. 452.
[26] 158 U. S. 232.
[27] 118 U. S. 425.

In re Manning [28] decided that a judge appointed by a governor who exceeded his authority was a judge *de facto* of a *de jure* court.

Ball v. *United States.*[29] The decision in this case may be summarized by the following quotation from the opinion of the court:

> "We are of the opinion that the irregularities alleged did not place Judge Baarman, in holding the October term, in any other position than that of a judge *de jure,* and as to his April term, he was a judge *de facto* if not *de jure,* and his acts as such are not open to collateral attack."

The above cases concern the fundamental principle of *de facto* officers. The next case, *Reichert* v. *Missouri, etc., Coal Co.,*[30] deals with the question of a trustee and his bond. This case can be distinguished from the instant case. The instrument creating the trustee's office did not provide that on failure to give bond he should be deemed to have declined the appointment, and that the failure should create a vacancy, as does the Bankruptcy Act. The failure did not create a *de facto* trustee; he did not act under a color of title, and the court did not so hold. The lessees were not precluded from inquiring into the question of bond or no bond, collaterally, because the trustee was a *"de facto* trustee" acting as a *"de jure* trustee", but because the question of the bond was of a nature that concerned the beneficiaries only.

The two remaining cases [31] cited by the court deal with the question of vacancies created in an office by the acceptance by the incumbent of another office of profit or trust. In these cases it was decided that such officers are *de facto* officers if they continue to occupy their first office, though the statute provides for a vacancy. Such statutes, as said above, are to be interpreted with proper regard for the intent of the legislative body enacting them. The intent of one body of law-makers may not be identical with that of another; circumstances may be different; the object sought to be accomplished in one instance may not coincide with that in another; and there are divers other considerations to be respected.

Therefore, it is submitted with deference that § 50 (k) is mandatory; that although the principle of *de facto* officers is well settled, the court in *Sharfsin* v. *United States, supra,* was not justified in applying it in this case; at least, not with the mere statement that "the principle has been too often decided to require discussion."

M. A. S.

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[28] 139 U. S. 504.
[29] 140 U. S. 118.
[30] 231 Ill. 238, 83 N. E. 116, 121 Am. St. Rep. 307.
[31] Oliver *v.* Jersey City, *supra;* State *v.* Coleman, *supra.*